



The Role of the Courts

Summary and Key Talking Points

Policy Proposals

1. Policymakers should pledge to promote the appointment of constitutionalist judges.
2. Senators should prioritize determining whether judicial nominees will be committed to the judiciary's role as designed.
3. Senators should not abuse their role of "Advice and Consent."

Quick Facts

1. Courts with judges who serve unlimited terms have a total of 860 seats around the country.
2. The lower courts have the last word on most federal cases because the Supreme Court of the United States decides only about 80 cases per year.
3. Judicial vacancies continue to compromise the judiciary's ability to serve its proper purpose.

Power Phrases

Constitutional

- Judges are required to swear an oath to uphold the Constitution, and the Senate should ensure that nominees have a record of interpreting the law as written.

Unbiased

- A judge's responsibility is to interpret the written law, not to create laws that align with his or her personal policy preferences.
- Judges should not have the power to redefine laws and traditions that Americans have known for more than two hundred years.

Unpoliticized

- Judicial nominees at all levels should not be considered political pawns to be captured by one party or another. They are servants of the American people with a duty to uphold the Constitution.

The Issue

America's Founders believed that the purpose of government is to secure such inalienable rights as life, liberty, and the pursuit of happiness, and they designed a system of government to further that purpose. This system limits government in several ways, such as separating the federal government into three branches, with checks and balances between them, and further dividing power between the federal and state levels of government.

The design of this system of government helps to define the role of each of its components, and those roles must be maintained for the system to achieve its purpose. To this end, not only is power separated into the three branches and divided between the federal and state levels, but the Constitution gives separate and distinct powers to each branch. Alexander Hamilton wrote that the exercise of these powers would involve will (the legislative branch); force (the executive); and judgment (the judiciary). Since the judicial branch is limited to using judgment in interpreting and applying the law to decide individual cases, Hamilton explained, it would be the “weakest” and “least dangerous” branch. This separation of powers, in both theory and fact, is so important, he wrote, that liberty itself depends on it.

As the Supreme Court explained in 1795, the Constitution contains “the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the Legislature.” Some cases therefore require that the Court evaluate whether laws enacted by the legislative branch are consistent with the Constitution—a process often referred to as “judicial review.”

While the *Marbury v. Madison* (1803) decision established the practice of judicial review, it did not relieve the legislative and executive branches of their independent responsibility to evaluate the constitutionality of their own actions. For example, when Congress decides which laws to enact, it is interpreting the Constitution. When Members of Congress reject legislation that would violate the Constitution, they are acting in accordance with their oath.

Similarly, the President carries out this oath by determining which bills to sign into law. The President may sign or veto legislation for political or policy reasons, but faithfully discharging his oath may also require vetoing legislation he believes would violate the Constitution. He (or she) may also choose not to enforce a law signed by one of his predecessors if he concludes that it is unconstitutional. The responsibility of each branch to ensure that its actions are consistent with the Constitution is always a present duty.

America's Founders designed a system of government in which the judiciary must exercise its judicial power, especially judicial review, in a particular way and not as the sole actor. With the Supreme Court taking the lead, however, the judicial branch has recently been pushing past those limits and has expanded its power beyond the design intended for it. In *Cooper v. Aaron* (1958), for example, the Court asserted that “the federal judiciary is supreme in the exposition of the law of the Constitution.” This trend has had several effects that undermine the liberty our system of government was designed to provide. For one thing, it has invited the other branches to ignore their independent duty to abide by the Constitution and to act as though they are free to do what they choose, in whatever manner, unless or until stopped by the courts.

In addition to proclaiming its superiority to the other branches in interpreting the Constitution, the judiciary has radically changed how it conducts that interpretation. Founder James Wilson, a signer of both the Declaration of Independence and the Constitution and one of the original six Supreme Court justices, explained that in a republic, “the people are masters of the government.” As a result, President George Washington said in his 1796 Farewell Address that the “basis of our political systems is the right of the people to make and to alter their constitutions of government.” Moreover, returning to *Marbury*, the Supreme Court emphasized that the Constitution is written so that the limits it imposes on government “may not be mistaken nor forgotten.”

If these principles are true, then they should direct how judges interpret and apply the law: A judge should use the Constitution as written and originally understood to conduct judicial review, not a constitution of the judge's own making with the meaning a judge wants it to have. Judges are limited, as the Supreme Court said in *Marbury v. Madison*, to “say[ing] what the law is,” and the Constitution is not, as Chief Justice Charles Evans Hughes would say a century later, “whatever the judges say it is.”

These principles apply as much to the judicial branch as they do to the other two branches. Judges therefore may not treat the Constitution in a way that takes control of the Constitution away from the people. For this to be a “government of laws and not of men,” as John Adams put it, the law, not judges themselves, must decide the cases and controversies that come before the courts.

In determining whether a contested law is consistent with the Constitution, judges act within their proper judicial power when they give effect to the original public meaning of the words and phrases of laws and the Constitution. A law's compliance with the Constitution is no guarantee of its soundness or wisdom. In fact, judges acting in accordance with their constitutional duties sometimes will uphold laws that may be bad policy while striking down laws that may be good policy. Judicial review requires the judge to determine not whether a law leads to good or bad results or accords with his or her personal views or priorities, but *whether that law violates the Constitution*.

Under the opposite approach, often called “judicial activism,” judges use whatever process or method is necessary to achieve their desired result. This approach might be described as the political ends justifying the judicial means. A judge who employs judicial activism might ignore the law's text or its original public meaning, relying on external sources such as foreign law, and might even fail to apply the law impartially. This is also sometimes called “living constitutionalism,” a theory in which the meaning of the Constitution itself evolves and changes not through the amendment process set out in the Constitution itself, but as a result of judicial decisions driven by the priorities and preferences of judges.

The following examples of Supreme Court activism, which involved high-profile issues, have garnered significant media attention:

- *Fisher v. University of Texas at Austin II* (2016), which, rather than requiring the university to meet the strict standards of the Constitution's guarantee of equal protection, allowed it to discriminate against prospective white and Asian American students.
- *Whole Woman's Health v. Hellerstedt* (2016), in which the Court, going beyond constitutional issues to make policy decisions and acting as “the country's ex officio medical board” as Justice Clarence Thomas wrote in his dissenting opinion, overturned reforms of substandard abortion clinics enacted by the Texas legislature.
- *King v. Burwell* (2015), in which the Court, in upholding the IRS's extension of tax credits to the federal health care exchange established pursuant to the Affordable Care Act, contorted the plain text of the statute to uphold President Barack Obama's signature legislative achievement for a second time.
- *Obergefell v. Hodges* (2015), which recognized a constitutional right to same-sex marriage with a decision that even supporters of the ruling have described as unintelligible and poorly reasoned.
- *Bostock v. Clayton County* (2020), which construed “sex” in Title VII of the 1964 Civil Rights Act to include sexual orientation and gender identity even though conceding that it meant only “biological distinctions between male and female” when Congress enacted it.

By contrast, a judiciary exercising its power as designed would decide each case in light of what the Constitution and the statutes say and what they originally meant, applying them impartially to the facts. Such judges respect the American people’s right to control the Constitution, to elect representatives who enact statutes, and to remain masters of the government.

Recommendations

Policymakers should pledge to promote the appointment of constitutionalist judges. Specifically, this means pledging to promote the appointment of judges who will follow the design for the judiciary by interpreting the law as written and applying it impartially to decide cases. It also means that the President should nominate—and Senators should confirm—only faithful constitutionalists.

Senators should prioritize determining whether judicial nominees are committed to the judiciary’s designed role in our system of government. In exercising “Advice and Consent,” which is a check on the presidential power to appoint new judges, Senators must determine whether nominees are qualified for judicial service. These qualifications include not only appropriate legal experience, but also the proper judicial philosophy. Senators should seek to determine a nominee’s understanding of the power and proper role of the courts, especially the process or method a nominee will follow to interpret and apply the law in deciding cases. Questions such as the following should inform the confirmation process:

1. Are judges limited to deciding individual cases involving specific parties and particular facts, or may they address issues and solve broad problems?
2. Should judges interpret the Constitution according to the original public meaning of its text, or may they find new meaning in other sources including foreign law?
3. May judges take into account the political interests that might be served by their decisions?

Senators should not abuse their role of “Advice and Consent.” The Senate advises as to whether the President should appoint someone he has nominated by giving or withholding consent. This does not mean, however, that the Senate has an independent, coequal power of appointment. The Senate should not use procedural tactics that effectively hijack the President’s power to appoint judges.

Facts + Figures

FACT: Courts with judges who serve unlimited terms have a total of 860 seats around the country.

- The Constitution gives Congress two categories of authority to create federal courts. Judges on courts established under Article I serve for specific terms. Those on courts established under Article III do not have specific terms, serving “during good Behaviour.”
- Article III judges are nominated by the President and must be approved by the Senate.
- Today, the U.S. District Court has 663 seats, the U.S. Court of Appeals has 179, the U.S. Supreme Court has nine, and the U.S. Court of International Trade has nine, for a total of 860 seats on Article III courts.

FACT: On average, judicial appointments do not keep pace with new judicial vacancies.

- Judges on Article III courts serve for an average of 22 years, long past the presidency during which they were appointed.

- During the past four decades, an average of 48 vacancies have occurred each year on Article III courts, more than 80 percent of them due to judges leaving their positions and the remainder due to the appointment of judges to different positions.
- Since 1981, Presidents have appointed an average of 46 judges to Article III courts per year.

FACT: The judiciary can struggle to serve its purpose when the number of vacancies increases and individual positions remain unfilled for a long time.

- The lower courts have the last word on most federal cases because the Supreme Court decides only about 75 cases per year, half as many as it decided per year two decades ago.
- Vacancies on Article III federal courts remained in triple digits for 32 straight months, from January 2017 through August 2019, the longest period in three decades.
- During the past two decades, an average of 45 percent of vacancies have been designated “emergencies” by the Administrative Office of the Courts because of their length and negative impact on caseloads.

Additional Resources

Sarah Parshall Perry and Thomas Jipping, “*Dobbs v. Jackson Women’s Health Organization*: An Opportunity to Correct a Grave Error,” Heritage Foundation *Legal Memorandum* No. 293, November 17, 2021.

The Honorable William H. Pryor Jr., “Politics and the Rule of Law,” Heritage Foundation *Lecture* No. 1325, October 20, 2021.

The Heritage Foundation, “The Essential Constitution,” September 2021.

Thomas Jipping, “Judicial Appointments During the 116th Congress,” Heritage Foundation *Legal Memorandum* No. 281, February 18, 2021.

Thomas Jipping, “‘Whatever Means Necessary’: Weaponizing the Judicial Confirmation Process,” Heritage Foundation *Legal Memorandum* No. 266, June 11, 2020.

The Honorable Carlos T. Bea, “Who Should Interpret Our Statutes and How It Affects Our Separation of Powers,” Heritage Foundation *Lecture* No. 1272, February 1, 2016 (delivered October 21, 2015).

The Heritage Foundation, “Supreme Consequences: How a President’s Bad Judicial Appointments Threaten Your Liberty,” 2016.

The Honorable Janice Rogers Brown, “Repointing the Constitution,” Heritage Foundation *Lecture* No. 1257, January 26, 2015 (delivered October 22, 2014).

Elizabeth H. Slattery, “How to Spot Judicial Activism: Three Recent Examples,” Heritage Foundation *Legal Memorandum* No. 96, June 13, 2013.

Robert Alt, “What Is the Proper Role of the Courts?” Heritage Foundation *Understanding America Series*, 2012.